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February 19, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: September 10, 2008

Case Number: TSO-0671

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxxx (hereinafter referred to as "the individual") to hold an access authorization 1/ under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should be granted.

I. Background

The individual is employed at a Department of Energy (DOE) facility where his work requires him to have an access authorization. During a background investigation, the local DOE security office (LSO) discovered some derogatory information that created a security concern. DOE asked the individual to participate in a Personnel Security Interview (PSI) in order to resolve the information. The PSI did not resolve the security concerns.

On August 25, 2008, the LSO sent a letter (Notification Letter) advising the individual that it possessed reliable information that created a substantial doubt regarding his eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (k) and (l) (hereinafter referred to as Criteria K and L, respectively). 2/

1/ Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

2/ Criterion K concerns information that a person has "[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, (continued...))

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case. At the hearing that I convened, the individual presented the testimony of five witnesses - his supervisor, two co-workers, a friend and his wife. He also testified on his own behalf. The DOE counsel did not present any witnesses. Both the individual and DOE submitted a number of written exhibits prior to and during the hearing.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denial"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that granting his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly

2/ (...continued)

etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law." 10 C.F.R. § 710.8(k). Criterion L relates, in relevant part, to information that a person has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security" 10 C.F.R. § 710.8(l).

consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As stated above, the LSO cites two potentially disqualifying criteria as bases for denying the individual's security clearance, Criteria K and L. The LSO's Criterion K concerns are predicated on the individual's illegal drug use in 1999 and 2004. In particular, the LSO cites the individual's one-time use of marijuana in 1999 and his admission that he used marijuana one time in 2004 while employed as a law enforcement officer. The LSO further alleges that, in 2004, the individual asked his brother-in-law for marijuana, knowing that he was a user of illegal drugs.

There are significant security concerns associated with past or current illegal drug usage. First, engaging in criminal conduct can raise questions about a person's ability or willingness to comply with laws, rules and regulations. *See* Guideline H of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House. Second, illegal drugs can impair a person's judgment which, in turn, can raise questions about the person's reliability and trustworthiness. *Id.* Moreover, from a common sense standpoint, a person's reliability and trustworthiness is questionable when he or she knowingly associates with persons who use illegal drugs.

As for Criterion L, the LSO again alleges that the individual admitted to using marijuana on one occasion in 2004 while employed as a law enforcement officer. The LSO further alleges that the individual admitted that he did not inform his employer of his illegal drug use in 2004. The individual also admitted that he was aware of his employer's random drug screening and how a positive drug test could jeopardize his job. The individual's admitted activities also raise questions about the individual's judgment and reliability. *See id.* at Guideline E.

IV. Findings of Fact

The relevant facts in this case are not in dispute. In February 2008, the individual submitted a QNSP in connection with an investigation of his eligibility to hold a security clearance. *See* DOE Exhibit 5. On the QNSP, the individual was asked to provide information regarding illegal drug use. *Id.* The individual reported that he has used marijuana on two occasions, one time in June 1999 and one time in December 2004. *Id.* The first time the individual used marijuana, the individual was a senior in high school and was out socializing with friends. *Id.* He was offered marijuana, which he tried out of both curiosity and peer pressure. *Id.* According to the individual, as soon as he tried the marijuana, he did not want to continue smoking it and did not recall any affects of the drug. *Id.*, DOE Exhibit 1.

The second time the individual used marijuana, he had been arguing with his wife over finances. *See* Transcript of Hearing (Tr.) at 40. According to the individual, the individual's brother-in-law, whom he knew used marijuana, was visiting at his home. *Id.* at 39. The individual asked the

brother-in-law if he had any marijuana at which point the brother-in-law rolled a “joint” and offered it to the individual. *See* DOE Exhibit 5. According to the individual, he took a puff and immediately stopped smoking. *Id.*, Tr. at 40. Again, the individual stated that he did not feel any effects from the use of marijuana. *Id.* The individual testified that he did not know why he smoked the marijuana, other than the stress of dealing with financial issues with his wife. *Id.* At the time the individual used marijuana in 2004, he was employed by a local police department and admits that he did not inform his employer of his use at that time. *See* DOE Exhibit 5. The individual also admits that he was aware of his employer’s random drug testing policy and the possibility of jeopardizing his job had he been tested at the time of his use. *Id.*

V. Hearing Officer Evaluation of the Evidence

The Criterion K concern raised by the LSO reflects the individual’s illegal drug use in both June 1999 and December 2004. During the hearing, the individual testified that he is embarrassed and is very remorseful for both of the marijuana incidents. Transcript of Hearing (Tr.) at 38. With respect to the December 2004 incident, the individual explained that three months prior to the incident a close friend and co-worker had died. The individual stated that he “wanted something that would take the pain away.” *Id.* at 39. However, he explained that as soon as he felt the marijuana smoke in his mouth, he regretted his actions, stopped smoking and asked his brother-in-law to leave his house. The individual also testified that he had just had an argument with his wife. He further testified that he was upset at the time, but once he smoked the marijuana, he realized the magnitude of what he had done. *Id.* at 40. The individual testified that he no longer associates with his brother-in-law. He also testified that he has had three negative drug tests in the last year and a half. *Id.* at 41. The individual reiterated that he is remorseful for the two marijuana incidents and stated that he will never use drugs again. *Id.*

The individual’s wife testified that the individual regrets having used drugs in the past and stated that she believes the individual will never use drugs again. *Id.* at 48. She corroborated her husband’s testimony that they no longer associate with her brother. *Id.* The individual’s wife further testified that the individual is an honest, reliable and trustworthy person. *Id.* She stated that the individual has matured a great deal since 2004 and that they have both grown in their marriage. *Id.* at 50.

The individual’s supervisor testified that he has never seen the individual under the influence of drugs and would be surprised if the individual ever used drugs in the future. *Id.* at 14. He further testified that the individual is an honest and reliable person who uses good judgement. *Id.* One of the individual’s co-workers testified that he has never observed the individual under the influence of drugs and considers him to be an honest, trustworthy and reliable person. *Id.* at 21. The second co-worker testified that he is a pastor of a local church and holds counseling sessions with persons with drug addiction problems. This co-worker opined that the individual’s behavior does not show a pattern of drug addiction. *Id.* at 26. He added that the individual is a very honest person. *Id.* Finally, the individual’s childhood friend with whom he socializes testified that he has no question regarding the individual’s honesty and trustworthiness. *Id.* at 30.

In evaluating the totality of the circumstances surrounding the individual's illegal drug use, I have determined that the following factors did not weigh in the individual's favor. First, the individual's willful disregard for the law by using illegal drugs is a serious matter. Second, the individual's conduct on both occasions in 1999 and 2004 was both voluntary and knowing.

Against these negative factors, I weighed the following positive ones. First, the individual voluntarily reported his use of marijuana to the DOE in 2008 when he executed his QNSP. Second, through his testimony, the individual convinced me that he understands the seriousness of his past drug usage and is taking full responsibility for his actions. The individual's current behavior demonstrates that he is now comporting himself in an honest, trustworthy and responsible manner. Third, the evidence convinced me that the individual's youth and immaturity at the time he used marijuana once in 1999 contributed to his poor judgment in using illegal drugs. Fourth, the individual convinced me that he had not used illegal drugs since the occurrence in 2004 and does not associate with persons who use drugs. The individual's wife and friend provided persuasive testimony to corroborate the individual's testimony on this point. Fifth, the individual's family and friends are aware of his past illegal drug use, a fact that lessens his susceptibility to blackmail, coercion and undue duress. Sixth, the individual has provided credible assurances that he will not use drugs in the future. In the end, the individual has provided compelling testimonial evidence that leads me to conclude that his past use of illegal drugs is unlikely to recur. On balance, the weight of the evidence demonstrates that the individual is a responsible and focused adult who understands the importance of following rules and laws. Accordingly, after carefully weighing all the evidence, both favorable and unfavorable, I find that the individual has presented compelling evidence to mitigate the Criterion K security concerns at issue.

The Criterion L concerns relate to the individual's honesty, reliability and trustworthiness. In response to these concerns, the individual first contends that he made a mistake when he smoked marijuana one time in 2004. He explained that after having an argument with his wife and dealing with the recent death of a close friend, he smoked a small amount of marijuana to deal with his stress. He further explained that as soon as he tasted the odor of marijuana in his mouth, he knew it was wrong and immediately blew it out. The individual, who has never had a security clearance, blames his drug use in 2004 on extremely poor judgment. With regard to not informing his employer of his illegal drug use, the individual testified that he was not aware of any obligation to inform his employer of his drug use, but admitted that maybe he should have informed his employer. He explained that he was extremely embarrassed by the incident and admitted that he believed it could jeopardize his job at the time.

As stated above, violating the law is a serious matter. It is especially concerning that the individual violated the law while employed as a law enforcement officer. However, despite the seriousness of the individual's conduct, there are several positive factors that outweigh the negative factors in this case. The record shows that the individual voluntarily disclosed the circumstances of his past drug use in 2004 on his 2008 QNSP. The individual's candidness in this regard demonstrates that he is taking full responsibility for his past misdeeds. Moreover, the testimony of the individual and his witnesses attest to the fact that the individual has matured a great deal since the events that gave rise

to the Criterion L allegations. The individual convinced me that his violation of law in 2004 was an isolated incident, that he is extremely remorseful for his actions and that he has become a more mature and responsible adult since the incident. I believe the individual's conduct does not cast doubt on his current reliability, trustworthiness or good judgment. Overall, after carefully evaluating all the evidence, both favorable and unfavorable, it is my common sense judgment that it is highly unlikely that there will be a recurrence of the conduct that gave rise to the Criterion L concerns. I find, therefore, that the individual has mitigated the Criterion L security concerns.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria K and L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I find that the individual has brought forth convincing evidence to mitigate the security concerns associated with Criteria K and L. I therefore find that granting the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should be granted. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: February 19, 2009